No. 82-61

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

and

BOARD OF EDUCATION OF THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

and

ALLAN G. BARCLAY, GERALD K. BRAZNELL, and GERALD B. HANSEN, DIRECTORS OF THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,
Petitioners,

v.

TERRI ANN MIENER, by and through her next friend and parent, CLYDE J. MIENER

and

STATE OF MISSOURI, *et al.*,

and

THOMAS E. SMITH,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

Respondent, Terri Ann Miener by and through her next friend and parent, Cyde J. Miener submits her Statement of the

Case to correct a misstatement found in Petitioners' Brief. Their Brief presents what they would have this Court believe to be an established and proven fact, when the truth of the matter is, the Court below has made no findings of fact, this case having been dismissed prior to the admission of evidence below. Petitioners have gratuitously stated that they had limited involvement in Terri Ann Miener's education and had never refused a request to provide educational services to her. It is Respondents' position that the Special School District has indeed refused to provide educational services to Terri Ann Miener, and Respondent anticipates the opportunity to establish that fact, *in evidence,* in the trial court below.

Other than this error, Petitioners have offered this Court a generally accurate statement of the case. However, at pages 6-7 of their Brief, Petitioners do mislead this Court by intimating that the District Court decision of September 19, 1980 was as a result of Petitioners' motions. Rather, the dismissal was in response to a Motion by the State of Missouri.

SUMMARY OF THE ARGUMENT

Petitioners posit the theory that in an action under Section 504 of the Rehibilitation Act, 29 U.S.C. §794, and the Civil Rights Act of 1865, 42 U.S.C. §1983, damages cannot be awarded to a Plaintiff who also has rights under the Education for All Handicapped Children Act, 20 U.S.C. §1401, *et seq.* (EAHCA). They claim that the assumed prohibition against monetary relief under EAHCA preempts previously existing general damage remedies found under the Rehabilitation Act and The Civil Rights Act.

As will be demonstrated hereinafter, such result does not comport with the previous decisions of this Court nor does it provide a logical answer to the fitting of these remedies into a cohesive framework.

Petitioners also contend that a special public school district is entitled to share the Eleventh Amendment immunities of the state. Respondent will show that the Eighth Circuit was correct in its decision, in keeping with the decisions of this court in *Edelman* v. *Jordan* and *Mt. Healthy School District* v. *Doyle,* among other cases.

ARGUMENT

I

The Decision Of The Court Below Was Fully Consonant With Relevent Decisions Of This Court In Its Holding That Petitioners Can Be Sued For Damages Under Section 504 Of The Rehabilitation Act, 29 U.S.C. Section 794 And Under The Civil Rights Act Of 1865, 42 U.S.C. Section 1983.

Petitioners' first reason for granting the requested Writ of Certiorari is that the lower court's decision concerning the Rehabilitation Act controverts relevant decisions of this Court. For support, they cite to decisions of this Court relating to the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (1976), Section 10(b) of the Securities Act of 1933, 15 U.S.C. §77(ə), and The Civil Rights Act of 1964, 42 U.S.C. §2000e-16(c) and §2000e-3(a)(1976). The only decision of this Court cited to by Petitioners which involves the statutes at issue before the lower court is *Board of Education of the Hendrick Hudson Cent. School Dist. Bd. of Ed., Westchester County* v. *Rowley*, ____ U.S. ____, 50 U.S.L.W. 4925, June 28, 1982. However, the *Rowley* case discusses Section 1415 of the EAHCA and not Section 504. Thus, Petitioners state that the decision below controverts *relevant* decisions of this Court, without citing any cases concerning the Rehabilitation Act itself.

Moreover, Petitioners' discussion of the *Rowley* case fails to disclose how its holding on EAHCA has been controverted by the lower Court's decision on the Rehabilitation Act. While these are related statutes, both of which Respondent relied uponin her Complaint, Petitioners are wholly unable to show how the decision of the lower court controvenes the *Rowley* decision. Thus, the entire basis for Petitioners' first reason in support of their Petition for Writ of Certiorari is without support.

Looking beyond Petitioners' lack of authority, it is also clear that the logic of their argument is faulty. Petitioners state that since damages are not awardable under EAHCA that an award of damages under Section 504 of the Rehabilitation Act provides an "end run" around the EAHCA damages prohibition. Of course, the premise of this argument is that damages are not allowable under EAHCA. This was the holding of the Eighth Circuit, below, but may or may not be a proper construction of that statute. Petitioners do not invite the attention of this Court to an analysis of the basic premise of this argument, but it is clear that a determination must first be made of the availability of the damage remedy under the EAHCA before the balance of Petitioners' argument can be considered. Respondents, in their Cross-Petition for Writ of Certiorari, will address the question of damages under EAHCA. It is Respondent's position that damages are indeed awardable under EAHCA. If so, then an award of damages under Section 504 of the Rehabilitation Act is in no way inconsistent.

But assuming, *arguendo,* that damages are not available under EAHCA, it is unnecessary for this Court to find that an award of damages under Section 504 arrives at an incompatable result. Because Congress is assumed to act consistently in its legislation, seemingly conflicting statutes are to be construed to avoid an inconsistent result. BLACK, Handbook on the Construction and Interpretation of the Laws (1911), pp. 18-19. Where there are two statutes on related subjects which are apparently in conflict with each other, they should be reconciled by construction to give full validity and effect to each, if this could be done without destroying the evident intent of the drafter. *Beals* v. *Hale,* 45 U.S. (4 How.) 37 (1846). While a later-enacted statute controls in the event of an unavoidable inconsistency between statutes, even where later statutes plainly abrogate settled practice or repeal former statutes, they are to be expounded as near to the use and reason of *prior* law as can be, without violation of their intent. BLACK at 348. Therefore, a

construction of apparently inconsistent statutes which can give full effect to each is the appropriate result.

Thus, assuming that damages should not flow from EAHCA cases, there are certainly instances where damages would still be appropriate under Section 504. The Eighth Circuit believes that damages are inappropriate under a statute having the sole purpose of assuring parents and educators a procedural framework which gives them "wide latitude to fashion an individualized education program." *Miener* v. *State of Missouri*, 673 F.2d 969, 979 (8th Cir. 1982.) That statutory goal is different from that of Section 504. That Section prohibits agencies receiving federal funding assistance from *denying access* to programs to qualified person because they are physically handicapped. 29 U.S.C. §794. Instances are certainly conceivable where the acts of an education provider could go beyond the perameters of EAHCA to a point of outright denial of access. This would be an appropriate situation for the award of damages. Because there is a difference of scope and purpose in these two statutes, the duty and liability of an education provider need not necessarily be identical under each.

Thus, it can be seen that there are circumstances where the two acts which mandate compliance by educators may consistently provide different remedies. For this reason, Petitioners' argument that the lower court has enunciated inconsistent standards in construing Section 504 is unconvincing.

II

The Lower Court Correctly Applied The Principles Of Federalism Established In *Edleman* v. *Jordan* And *Mt. Healthy School District* v. *Doyle* In Its Holding That The Special School District Is Not Entitled To Eleventh Amendments Immunities.

Petitioners cite to *Edlemen* v. *Jordan*, 415 U.S. 651 (1974), which stated that one rationale for the Eleventh Amendment is

the prevention of federal judicial interference with the inner-workings of state treasuries. 415 U.S. at 663. Petitioners also correctly state that this Court has previously held in *Mt. Healthy School Dilstrict* v. *Doyle,* 429 U.S. 274 (1977), that a school district is not entitled to Eleventh Amendment immunities. 429 U.S. at 280.

Petitioners then attempt to limit *Mt. Healthy* to a legal theory not even mentioned in that decision. It is Petitioners' peception that the only reason the Mt. Healthy school district was not entitled to the State's Eleventh Amendment immunity was because the damages sought could not conceivably be paid out of the State Treasury. Petitioners state that "there is simply no mechanism by which the liability of the local school district would be transfered to the state" but offer no support for this statement whatsoever. Without support from the facts presented before the judiciary in *Mt. Healthy,* or the law therein, Petitioners arbitrarily decide that there could not have been any instance in *Mt. Healthy* where the state might assist the local school district in satisfying a judgment. This is pure speculation on Petitioners' part.

Petitioners' speculation does not stop there. Petitioners suppose that should the Special School District lack funds to provide an appropriate education for all its students as a result of their assumption of liability for violating the rights of the handicpapped, that "a general analysis of the statutes indicates that the state would become responsible for the Special District's 'severly handicapped' students." Petitioners' Petition at 22-23. Yet, by this so-called "general analysis" of the statutes, Petitioners' state that "there is no express provision applicable in the event of a determination against the Special School District under Section 1414(d) of EAHCA . . .." Petitioners go on to state that even without this express provision it is "most likely" that the financial responsibility for these severly handicapped children would "*almost* certainly be passed on

to the state . . .." Petitioners' Petition at 24 (emphasis added). Petitioners further state that in the event that the Special School District is subject to this speculative liability, that the District would *almost certainly wish* to continue providing appropriate educations of . . .", *Id.* (emphasis added). They claim without clear support that the assumed resultant shortage of funds would be borne exclusively by the severly handicapped. *Id.*

Petitioners' logic dictates that *Mt. Healthy* is only reconcilable with *Edlemen* if one assumes that, under the facts in *Mt. Healthy,* there was no possible way for the State to assist the local school district in the payment of judgments. Thus, Petitioners would argue, if they are able to envision any means, whatsoever, whereby the State of Missouri may wish to assist the Special School District in satisfying its legal obligations as a result of a Section 504 judgment, that *Mt. Healthy* and *Edlemen* would require that the Special District be entitled to an Eleventh Amendment immunity. Thereto, Petitioners track a trail through the Missouri statutes speculating as to how "it is most likely" that Petitioners liability "could be" so enormous that the state "would almost certainly" be required to make payments from the State Treasury to keep the Special School District afloat. Such speculation does not deserve consideration by this august body.

Moreover, the linch pin to the Petitioners' argument is that its suffering of any severe financial burden requires that the State assume financial responsibility *under EAHCA*. What they fail to consider is that the lower court has established a possible financial liability on the Petitioners through the Rehabilitation Act and *not* the EAHCA. Thus, Petitioners argument says that if they are liable under Section 504 for damages, and are then unable to meet their daily financial obligations, the EAHCA requires the state to pay for the shortage. As uncertain as this result is, even according to Petitioners' Brief, Petitioners would apparently see an obligation under EAHCA for the State of

Missouri to pay for *any* financial obligation imposed judicially or otherwise, on the Special School District. What the district is saying is that that EAHCA has created for them Eleventh Amendment immunities for any and all purposes. Petitioners offer no citation for the proposition that a congressionally enacted statute can create such pervasive protection for a public body by the enactment of a statute dealing with handicapped education. Respondent can find no support for such an unusual theory.

The law of this Court is clear. Under *Mt. Healthy* a local school district is not entitled to Eleventh Amendment immunity. *Mt. Healthy* creates no exception to this rule which could be applicable here. The decision of the lower court that the Special School District is not entitled to protection under the Eleventh Amendment is well founded and consonent with the holdings of this Court.

CONCLUSION

Petitioners, in their Petitioner for a Writ of Certiorari, have presented no grounds for this Court to exercise it discretionary jurisdiction to review the Eighth Circuit opinion. This opinion does not conflict with any decision of this court.

As set forth hereinabove, the remedy of monetary relief under Section 504 of the Rehabilitation Act is an appropriate result for its violation. Additionally, it would require the grossest form of speculation to perceive of a fact situation where the Treasury of the State of Missouri would be violated by a damage award of any nature against the Special School District of St. Louis County, Missouri. On these two points, the Eighth Circuit properly made its conclusions of law, charging the Special School District with the responsibility of compensating handicapped persons for the District's wrongful denial of access to their programs and activities.

For all of the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit herein should be denied.

Respectfully submitted,

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